APPENDIX A.

THE AVERMENTS IN RESPONDENT'S ANSWER RELATING TO ITS DEFENSE OF MEETING COMPETITORS' EQUALLY LOW PRICES IN GOOD FAITH (DEFENSE NO. IV). (R. 17-22)

26.

Respondent hereby realleges by reference all of the matter contained in Defense No. I, II, III, V and VI hereof.

27.

For further defense Respondent alleges that for many years last past, and since June 19, 1936, and presently, competition in all phases and branches and classifications of the gasoline marketing business in Detroit, has been, and is extremely keen, vigorous and aggressive; that many refiners, suppliers, wholesalers, jobbers and retailers of gasoline have been, and are, operating therein, and are constantly seeking new and additional outlets, markets and customers for their gasoline: that some of said marketers of gasoline continuously, and some periodically, attempt to invade, proselyte and raid the markets and customers had by other marketers; that competitive conditions and price conditions in relation to marketing of gasoline are and have been continuously chaotic, uncertain and disturbed in varying degrees for many years and are so now; that many devices, schemes, plans, concessions, premium offers, rebates, special deals, special discounts, inducements, preferential considerations, commercial bribery, special allowances, favorable contracts, preferential offers of services and facilities, and cut prices, are constantly being used and offered by a substantial number of marketers in all branches of gasoline marketing. Further, that the State of Michigan and City of Detroit are areas high in gasoline consumption and are well supplied with water, rail and pipeline transportation; that many water terminals for the handling of gasoline exist on the boundaries of the state and more particularly on the water boundaries of the lower peninsula thereof; that there exists a substantial amount

of crude oil production within the state and there are numerous large and small refineries scattered through the lower peninsula thereof seeking outlets for their products; that immediately contiguous to the south of the state, and particularly in northern Ohio, Indiana and Illinois, there are many large and small refineries and crude oil and gasoline pipeline terminals which have ready and cheap means of transportation for gasoline into Michigan by means of water, rail and pipeline; that the State, and the cities within it,—particularly Detroit,—offer an attractive market to marketers of gasoline; that abundant supplies of gasoline are easily and readily available from many sources to supply that market; that all of these factors contribute to and stimulate the chaotic and disturbed competitive gasoline marketing conditions in all branches of said marketing in Detroit as referred to above.

28.

Respondent alleges that for many years last past it has operated a gasoline marketing business in Detroit under the conditions described in Paragraph 27 above; that since September, 1936 Respondent has not and does not engage in the operation of retail service stations; that Respondent's business in Detroit in gasoline marketing to resellers of gasoline is confined to (a) sales to retail resellers such as are described in Paragraph Two Complaint and who are supplied and serviced directly by Respondent through its own organization and distribution system in Detroit, and (b) to wholesale and jobber dealers such as those named in Paragraph Three Complaint; that presently, and for approximately three years last past, the four dealers named in Paragraph Three Complaint are the only wholesale or jobber customers in Detroit which Respondent has; that prior thereto Respondent had other such customers but lost them to competitive suppliers by reason of lower price offers and inducements given by Respondent's competitors, which Respondent could not meet or declined to meet.

29.

Respondent alleges that said four dealers named in Paragraph Three Complaint, or their predecessors, have been continuously, for many years last past, the gasoline

customers of Respondent: that at the time each of said customers went onto a tank car basis of purchasing gasoline that it could purchase on such basis, comparable gasoline to that sold by Respondent, from a number of Respondent's competitive gasoline suppliers for an equally low or lower price than from Respondent, and upon equally or more advantageous terms and arrangements in the matter of facilities, services, inducements and benefits than it could or did receive from Respondent, and each of said customers knew of such existing and current opportunities and offers from competitors of Respondent and had from such competitors specific offers equally as low or lower in price, and equally or more favorable in terms and the furnishing of services and facilities than it had from Respondent; that Respondent knew of the existence of such competitive offers to said customers from various sources and was advised of them by said customers and advised that Respondent must meet or approach meeting such offers to retain said customers; that had not Respondent at such time given to each of said customers the tank car basis and price for purchasing gasoline, each of said customers would have been lost by Respondent to a competitive supplier.

30.

Respondent alleges that from the time each of said four customers began purchasing gasoline on a tank car basis and price there has never been a time, including the present, when each of said customers could not have purchased, and they could now purchase, comparable gasoline to that sold by Respondent at equally low or lower prices and on equally or more favorable arrangements and terms from competitors of Respondent than are granted to them from Respondent; that each of said customers have from time to time, since June 19, 1936, advised of and discussed with Respondent a number of such competitive offers; that in order to have retained, and to now retain, each of said customers it has been, and is now, necessary to continue it on said tank car basis and price, and that if such price or arrangement were made any less favorable to any of said customers by Respondent at the time such price and arrangement was made, or now, that Respondent

would have then, or would now, immediately have lost, or would now lose, said customer to a competitive supplier; that Respondent is informed and verily believes, and on information and belief alleges, that in the face of more favorable offers from competitive dealers to said four customers frequently being made, that Respondent could not have heretofore, or could not now, retain said customers except for the existence of a long business association with them, established good will, and the public acceptance that Respondent and said customers have built for Respondent's gasoline.

31.

Respondent alleges that in respect of the reduction of the dealer tank wagon price by ½¢ per gallon of gasoline given to Ned's Auto Supply Company in September, 1936, which continued through February, 1938, that Respondent was forced to make said reduction in price by a specific offer or offers made to said customer in August, 1936, by a supplier of gasoline competing with Respondent; that said competitive offer was in connection with gasoline comparable to that supplied by Respondent and was offered to said customer at a price equally low or lower, and upon terms and arrangements with respect of facilities, services and benefits equally or more favorable to said customer, than were the said reduced price and arrangement that was offered by Respondent to meet such competitive offer; that Respondent was advised by said customer of said competitive offer and advised that said customer would accept it unless Respondent reduced its price; that Respondent agreed to make said reduction to partially meet said competitive offer and because of the compulsion of such competitive offer; that said customer advised Respondent that Respondent's reduced price was not fully competitive nor satisfactory, and did not fully meet said competitive offer, but that it would continue purchasing from Respondent thereunder for the time being; that had not Respondent made such reduction in price in said instance, fully as great as it did, Respondent would have at that time lost said customer and was so advised by it; that if Respondent had not continued said reduction in effect until early March, 1938, when said customer qualified to

purchase in tank car lots and on a wholesaler basis, Respondent would have promptly lost said customer upon withdrawing the reduced price, and Respondent was constantly under pressure from said customer, induced by competitive offers to it, to make further reduction and to accord said customer more favorable purchasing arrangements, which matters were frequently discussed by said customer with Respondent; that as hereinbefore alleged said reduced price and basis has not been in effect or used since early March, 1938.

Further, that during the period said reduced price was in effect said customer took deliveries of gasoline in such relatively large quantities at such relatively few service stations compared to other retail resellers being serviced by Respondent, and such other facts and circumstances were existent, as to render such ½¢ per gallon of gasoline price reduction substantially commensurate with savings to Respondent arising from difference in the cost of sale and delivery of gasoline to said customer by Respondent resulting from the differing methods and quantities in which such gasoline was sold and delivered to said customer, and said ½¢ per gallon reduction in price to said customer made only due allowance for said savings accruing to Respondent as nearly as the same are fairly and reasonably calculable.

32.

Respondent alleges that at no time since June 19, 1936 has it offered or granted a preferential price below its established regular price, nor offered or granted concessions not regularly accorded all customers, to any of its customers, or classes of customers, except as the same was made necessary in order to meet an equally low or lower price offered by a competitor of Respondent, and Respondent has never made such preferential or reduced price offers to proselyte customers from other suppliers, and never have such preferential offers or any acts in relation thereto on Respondent's part, had the effect, or tended to have the effect, or were likely to have the effect, of substantially lessening competition in any line of commerce, nor did they tend to create a monopoly in any line of commerce (specifically including gasoline commerce), nor

did they injure, destroy or prevent competition, or tend to do so, with Respondent or any of its customers, or any of its customers' customers, or with any person or persons whomsoever, or at all, in Detroit or elsewhere.

33.

Respondent alleges that as particularly set forth above, that by reason of competitive compulsion and offers made by competitors of Respondent, which offers were for lower prices and more favorable sales arrangements than those being offered by Respondent, that Respondent, in good faith and because of necessity therefor to retain its customers, met, or partially met, the lower prices and more favorable terms and arrangements in respect of services, facilities and benefits offered by Respondent's competitors to the four dealers named in Paragraph Three Complaint, and Respondent alleges that all of the lower prices alleged to have been granted since June 19, 1936, and all that were granted, to said four dealers, were made to them in every instance in good faith to meet an equally low or lower price and equally or more favorable sales arrangements in respect of services, facilities or benefits made or furnished by a gasoline supplier or suppliers which were and are competitors of Respondent, all in strict accordance with law; and, hence, all of the acts of Respondent in respect of differentials in gasoline prices granted by Respondent, as between that class of dealers described in Paragraph Two Complaint and that class named in Paragraph Three Complaint were fully and completely justified, and do not constitute a violation of Section 2 (a) of the Clayton Act as amended, and are not unlawful thereunder or under any law.

APPENDIX B.

June 27, 1956.

Hon. JAMES O. EASTLAND,

Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR EASTLAND: It has recently come to our attention that Federal Trade Commissioners Sigurd Anderson and Robert T. Secrest have withdrawn their objections to the enactment of the proposed bill (S. 11) to amend the Robinson-Patman Act with reference to equality of opportunity and urged its support. In view of the fact that this action results in a majority of the Federal Trade Commissioners now favoring enactment of this proposed legislation and, in view of the fact that the companion House bill H. R. 1840 was passed by the House on June 11, it has been suggested that we reexamine our announced opposition to this legislation.

We understand that Commissioners Anderson and Secrest based their change of position on the recent seventh circuit court's opinion in the Standard Oil of Indiana case and the denial of certiorari by the Supreme Court in the Balian Ice Cream Co. case. We have carefully analyzed the decisions in these two cases and do not feel that these holdings indicate a need for the proposed legislation.

In the Standard Oil of Indiana case the seventh circuit court appeared to place great weight on the fact that Standard Oil had apparently proved in the original proceeding that its lower prices were made in good faith to meet an equally low price of a competitor because of the fact that the findings of the Federal Trade Commission initial hearing examiner to this effect were never repudiated or disproved. The Court commented: "We think it is pertinent to observe that petitioner's good faith has either been recognized or assumed at all levels during this proceeding." The Court apparently was convinced that Standard Oil had proved that it was meeting a "lawful" lower price of a competitor, stating "in the instant situa-

tion there is no finding, no contention, and not even a suspicion but that the competing prices which petitioner met were lawful." Finally, the Court held that these price reductions, used as a defensive mechanism to retain the four existing customers, were based upon individual competitive situations rather than pursuant to a "pricing system" stating "[t]he bargaining and haggling which took place between petitioner and the four involved 'wholesalers' prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system."

In the Balian Ice Cream Co. case (*Balian Ice Cream Company, Inc.* v. *Arden Farms Company*), the Supreme Court of the United States denied certiorari and thus refused to review the ninth circuit court's opinion. The Ninth Circuit Court of Appeals had affirmed a judgment for the defendants in this action. The district court had made extensive findings of fact and had held that Arden Farms by its blanket price cut in the Los Angeles area had not discriminated in price upon a territorial basis in violation of section 2 (a) of the Robinson-Patman Act. The plaintiffs in this action were independent manufacturers and distributors of dairy products in the Los Angeles area. The ninth circuit affirmed the case on the basis that the requisite competitive injury for a section 2 (a) Robinson-Patman Act violation was not present stating "[t]here was no evidence that trade or commerce, interstate or otherwise, was lessened or burdened by any action of defendants in this case. The findings of the trial court expressly negativing the existence of any such consequences or a possibility of such results were supported by substantial evidence." The ninth circuit then proceeded to discuss, at some length, the permissive scope of section 2 (b). Some of this 2 (b) language is disputable in light of the Supreme Court's decision in the Standard Oil of Indiana case; it is our belief that this language should be treated as dictum and, for that reason, should not be considered as precedent for future 2 (b) proceedings.

It is our position that neither of the above cases furnishes sufficient basis for the Department to change its position of opposition to the so-called equality-of-oppor-

tunity legislation. They do not broaden the scope or adversely affect what we consider to be the merits of a section 2 (b) defense.

As pointed out in the Department's letter of March 6, 1956, "[w]hile we recognize the competitive problems which arise when one purchaser obtains advantages denied to other purchasers, we do not believe the solution of the problem lies in denying sellers the opportunity to make sales in good faith competition with other sellers." These pricing differences may, we emphasize, be justified under existing law only in response to individual competitive situations and may not be extended beyond what is necessary to meet good faith offers of competitors. A seller's right to meet a competitor's lawful prices by granting price differentials to some customers without reducing his prices to all seems consonant with our national antitrust policy and should remain an essential qualification to any anti-price-discrimination law. A seller constrained by law to reduce prices to some only at the cost of reducing prices to all may well end by reducing them to none.

This proposed legislation would appear to limit the 2 (b) defense to those instances in which the effect of the discrimination would be "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination or with customers of either of them." As stated in the Department's letter of March 6, 1956, this anticompetitive effect has so rarely appeared as a basis for either a complaint or a decision involving price discrimination that the result of enactment of this proposed legislation would be to render 2(b) practically meaningless.

In view of the foregoing considerations, the Department of Justice opposes the enactment of S. 11 or its companion bill H. R. 1840.

Sincerely,

WARREN OLNEY III,
Acting Deputy Attorney General.